necessary in view of section 222.[616] The Commission tentatively concluded that it should not extend its CPNI requirements to carriers that are not affiliated with AT&T, the BOCs, or GTE.[617] The Commission also recognized that, in certain respects, the *Computer III* CPNI framework is more restrictive than the 1996 Act.[618] The Commission decided that these additional restrictions would remain in effect, pending the outcome of this rulemaking, to the extent that they do not conflict with section 222.[619] The Commission also asked parties to address whether privacy, competitive concerns, or other considerations justified the retention of our existing CPNI requirements, what the costs and benefits of retaining these CPNI requirements would be, and how changing our CPNI requirements might influence other nonstructural safeguards adopted prior to the 1996 Act.[620] In the event the Commission concluded that we should continue to subject the BOCs, AT&T, and GTE to CPNI requirements that are more restrictive than those applicable to other carriers, the Commission sought comment on whether such differential treatment should be permanent or limited in duration and, if limited, what sunset provisions should apply.[621]

178. The Commission also tentatively concluded that AT&T's recent classification as a non-dominant carrier for domestic services, and its plan to separate its equipment business from its telecommunications service business, justified removal of our CPNI requirements as to it.[622] The Commission asked whether AT&T continues to possess a competitive advantage with respect to access to and use of customer CPNI, and whether privacy concerns, competitive concerns, or any other considerations justify special regulatory treatment of AT&T with regard to CPNI.[623]

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[616] *Notice* at 12530, ¶ 41.

[617] *Id.* at 12515-16, 12530, ¶ ¶ 3, 40.

[618] *Id.* at 12529, ¶ 38.

[619] *Id.* at 12515-16, 12529, ¶ ¶ 3, 38.

[620] *Id.* at 12530, ¶ 41.

[621] *Id.* at 12515-2516, 12530-31, ¶ ¶ 3, 42.

[622] *Id.* at 12515-16, 12530-31, 12533, ¶ ¶ 3, 42, 48 (*citing Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995), Order on Reconsideration, Order Denying Petition for Rulemaking, Second Order on Reconsideration in CC Docket No 96-61, 12 FCC Rcd 20787 (1997).

[623] *Id.* at 12530-31, ¶ 42.

179. Several parties argue that our existing *Computer III* CPNI framework for the BOCs and GTE is unnecessary and should be eliminated.[624] AT&T and LDDS Worldcom argue that, in any event, the Commission's existing CPNI requirements should not continue to apply to AT&T because it has been classified as nondominant.[625] Other parties argue that we should retain the *Computer III* CPNI requirements for the BOCs and GTE,[626] and additionally for AT&T.[627] Several of these commenters further contend that we should extend some or all of the preexisting requirements to carriers other than AT&T, the BOCs, and GTE.[628]

### 2. Discussion

180. We conclude that retaining the *Computer III* CPNI requirements, applicable solely to the BOCs, AT&T and GTE, would produce no discernable competitive protection, and would be confusing to both carriers and customers.[629] The statutory scheme we implement in this order effectively replaces our *Computer III* CPNI framework in all material respects.[630] For example, like under the *Computer III* CPNI framework, our new scheme establishes the extent that carriers, including AT&T, the BOCs, and GTE, must notify

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[624] Ad Hoc Reply at 9; Ameritech Comments at 14; Bell Atlantic Comments at 2, 9; Bell Atlantic Reply at 8; BellSouth *ex parte* (filed Oct. 17, 1996); BOC Coalition *ex parte* (filed Aug. 13, 1997); BellSouth Comments at 22; GTE Comments at 16; NYNEX Comments at 18-19; PacTel Comments at 14; PacTel Reply at 3-4; SBC Comments at 14; SBC Reply at 5; USTA Reply at 3; U S WEST Comments at 20, 21.

[625] AT&T Comments at 4 n.3; AT&T Reply at 8 n.17; LDDS Worldcom Comments at 12.

[626] ACTA Comments at 6; AICC Comments at 8; ALLTEL Comments at 2; ALLTEL Reply at 3; Arch Comments at 12-13; AT&T Comments at 4; CPI Reply at 13; CompTel Comments at 3, 8; CompTel Reply at 8; Excel Comments at 5-6; ICI Reply at 4; ITAA Comments at 9-10; LDDS WorldCom Comments at 12; LDDS WorldCom Reply at 10-11; MCI Comments at 18-19; MCI Reply at 14; Sprint Comments at 7; Sprint Reply at 11; TCG Comments at 2-4; TRA Comments at 17; TRA Reply at 4; Washington Commission Comments at 9-10.

[627] *See, e.g.*, Arch Comments at iv, 12-13; Excel Comments at 6; TRA Reply at 4.

[628] *See, e.g.*, MCI Comments at 21; PaOCA Comments at 5.

[629] *See, e.g.*, Bell Atlantic Comments at 10; NYNEX Comments at 20-21; PacTel Comments at 17; SBC Reply at 5; USTA Reply at 3. We accordingly reject CPI's suggestion that we should consider repeal of the CPNI requirements in a separate proceeding after this order, so that parties would be able to comment specifically on whether our *Computer III* CPNI requirements should be retained in light of the new CPNI scheme. CPI Reply at 13-14. The record is developed on this issue, and we believe that delay would only serve to confuse customers and carriers for no particular benefit.

[630] *See, e.g.*, Ameritech Comments at 15-16; Ameritech Reply at 4; BellSouth Comments at 22; SBC Reply at 5; *see also* NYNEX Comments at 19 (Congress has occupied the field as shown by its tracking of and rejection of certain elements in the *Computer III* requirements).

customers of their CPNI rights, obtain customer approval before using CPNI for marketing purposes, and accommodate customer requests for partial or temporary restrictions on access to CPNI.[631] We also set forth under the new scheme the circumstances under which carriers, including AT&T, the BOCs, and GTE, must make individually identifiable and aggregate CPNI available upon request.[632]

181. The legislative history is silent on the issue of the *Computer III* requirements. Some commenters argue that we should interpret Congress' silence as indicating its intention that the *Computer III* CPNI requirements be retained.[633] Other parties argue that the silence indicates the intention that the existing framework be eliminated.[634] Because Congress offered no explanation on this point, we do not find the history helpful either way. Rather, we find that the rules we implement in this order satisfy the concerns upon which the *Computer III* framework is based, and therefore we replace them with the new scheme. We note that, although we eliminate our *Computer III* approval and notification requirements, as requested by several carriers, the rules we implement herein are actually more in line with those endorsed by carriers urging us to retain our prior framework in which the BOCs, AT&T, and GTE provide notification to their multi-line business customers, and need prior authorization in the case of twenty or more lines.[635]

182. We are persuaded that the competitive and privacy concerns upon which the *Computer III* CPNI framework rests are fully addressed by our new CPNI scheme, and that, continued retention of our *Computer III* CPNI framework would produce no additional benefit.[636] Indeed, in two important respects, the rules we promulgate herein implementing

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[631] *See* discussion *supra* Part V. Moreover, our interpretation of section 222(d)(3), which permits partial and temporary permission for carrier use of CPNI, is consistent with our prior CPNI requirements requiring as much. *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1161-64, ¶ ¶ 86-115 (customers may authorize the release of some or all of its CPNI for a specific time and/or for specific purposes).

[632] Section 222(c)(2) expressly replaces our prior requirement which provided for the BOCs', AT&T's, and GTE's release of CPNI to competitors upon the customer's request. Likewise, section 222(c)(3) replaces our aggregate requirements in connection with the BOCs and GTE. Ameritech Comments at 15-16 (these two provisions of the Act incorporate virtually the same requirements as the FCC rules).

[633] LDDS Worldcom Reply at 10-11; Sprint Reply at 11-12.

[634] *See e.g.*, GTE Comments at 16-17; GTE Reply at 2, 5, 9; PacTel Reply at 4-6, 13-14.

[635] *See, e.g.*, C&W Comments at 4; MFS Comments at 11.

[636] In this regard, we disagree with parties to the extent they argue that competitive considerations no longer justify certain protective CPNI requirements. *See, e.g.*, Ameritech Comments at 15-16; Bell Atlantic Comments at 9; Bell Atlantic Reply at 3; NYNEX Comments at 20; PacTel Comments at 14, 17. Rather, we agree with commenters that competitive considerations continue to support CPNI regulation, although under

section 222 afford information services providers and CPE suppliers greater protection from carriers' anticompetitive CPNI use. First, the new scheme applies to all carriers, and in so doing, extends the scope of protection consistent with section 222.[637] We believe applying our new CPNI rules to all carriers generally furthers the objective of section 222 of safeguarding customer privacy.

183. Second, several of the new scheme's CPNI requirements operate to make carriers' anticompetitive use of CPNI more difficult. Unlike the *Computer III* CPNI framework, which requires customer authorization only from businesses with over twenty lines, we now require that all carriers obtain customer approval from all customers, including small businesses and residential customers with any number of lines, before carriers can use CPNI to market information services or CPE.[638] Although the *Computer III* CPNI framework affords customers the right to restrict access to their CPNI records, whereas under our new scheme the customer's right is to withhold approval, the result nevertheless is the same -- the customer has the right to control whether a carrier uses, discloses, or permits access to its CPNI.[639] Indeed, in contrast with the *Computer III* CPNI framework, which generally permits CPNI use unless and until the customer affirmatively acts to restrict, our new scheme prohibits carriers from using CPNI unless and until they obtain customer approval, and in this way offers customers greater control.[640] Moreover, we conclude that carriers must notify all customers of their CPNI rights under our new scheme, not merely their multi-line business customers as is required under the *Computer III* CPNI framework.[641] This notice requirement, therefore, similarly affords greater competitive protections. Finally, by its terms, section 222(c)(3) extends the obligation to provide non-discriminatory access to aggregate customer

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section 222, we extend the framework to all carriers, not just those carriers with market power. *See, e.g.*, Arch Comments at 13; Excel Comments at 5-6.

[637] We note that issues relating to whether we should apply CPNI rules for larger carriers that are different from those we apply to small carriers are addressed in section VIII(D).

[638] *See* discussion *supra* Part V; ¶ 180.

[639] *See* discussion *infra* Part VIII.D.2, in connection with safeguards.

[640] Because of this change, several of our prior requirements, which clarify the duration and timing of a customer's right to restrict CPNI, are rendered either unnecessary or redundant. *See e.g., BOC CPE Relief Recon. Order*, 3 FCC Rcd at 24, 25, ¶ ¶ 16, 22 (establishing that a customer need not annually request that its CPNI be withheld from the BOC's CPE operations; a customer's assertion of confidentiality remains in effect until the customer explicitly states otherwise; a customer may require and receive confidential treatment of its CPNI before the customer receives the first annual notification of its CPNI rights); *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1161-64, ¶ ¶ 86-115 (a customer's election to restrict CPNI remains in effect unless specifically modified).

[641] *See* discussion *supra* Part V.F.

information, when used for purposes outside of the provision of the customer's total service offering, to all LECs, not just the BOCs and GTE. Thus, under section 222(c)(3), information service providers and CPE suppliers are entitled to competitively useful aggregate information from more carriers than they had been in the past.[642] In these ways, the new scheme is more protective of competitive and privacy interests than currently exists under the *Computer III* CPNI framework.[643] We thus find no competitive or privacy justification at this time to retain our former framework.

184. Nor will the elimination of the *Computer III* CPNI framework weaken other nonstructural safeguards. We agree with Ameritech, PacTel and GTE that the Commission's other *Computer III* requirements are independent of CPNI regulation, and would continue to prohibit discriminatory network access and protect against any alleged "bottleneck" leverage.[644] Finally, we conclude that, insofar as we eliminate the *Computer III* CPNI requirements, carriers' ONA and CEI plans no longer have to address CPNI.[645]

### C. BOC Cellular CPNI Rule 22.903(f) and *Computer II* Rule 64.702(d)(3)

#### 1. Background

185. Under section 22.903(f) of the Commission's rules,[646] BOCs may not provide CPNI to their cellular affiliates unless the information is made publicly available on the same terms and conditions. The Commission invited comment in the *CMRS Safeguards Notice*[647] on whether rule 22.903(f) should be eliminated in light of section 222 of the Act.[648] The

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[642] *See* discussion *supra* Part VI.

[643] Although we eliminate password I.D. and access restrictions, as discussed *infra* Part VIII.D, we replace these safeguards with equally effective mechanisms that complement our new scheme.

[644] Ameritech Reply at 5; GTE Comments at 16 n.39; PacTel Comments at 15.

[645] *Computer III Further Remand Further Notice*, *supra* note 32.

[646] 47 C.F.R. § 22.903(f).

[647] *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, 11 FCC Rcd 16639 (1996) (*CMRS Safeguards Notice*).

[648] *Id.* at 16675-76, ¶ 72.

Commission expressly retained the rule in the *CMRS Safeguards Order* pending the resolution of CPNI issues in this proceeding.[649]

186. Established in the context of the *Computer II* proceeding, and similar to rule 22.903(f), rule 64.702(d)(3)[650] prohibits common carriers from sharing CPNI with their structurally separate enhanced services and CPE affiliates unless the CPNI is made publicly available.[651] In the *Notice* in this proceeding, the Commission sought comment generally on whether we should retain the current CPNI rules which were developed in a series of Commission proceedings in connection with the BOCs, AT&T and GTE's provision of enhanced services and CPE, including, among others, *Computer II*.[652]

187. Several commenters argue that continued retention of the BOC CPNI cellular rule 22.903(f) is important because CPNI derived from former monopoly local exchange operations provides BOCs with an advantage in assisting their CMRS affiliates, and unless this information is also made available to non-LEC-affiliated entities, competition is undermined.[653] No commenter specifically supports continued retention of rule 64.702(d)(3), although many commenters generally argue that all of our existing CPNI regulations, of which rule 64.702(d)(3) is a part, should remain.[654] In contrast, the BOCs and GTE argue that we should eliminate rule 22.903(f), and all of the Commission's other pre-1996 Act rules (*e.g.*, *Computer II* and *Computer III* CPNI regulations) because section 222 and its

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[649] *CMRS Safeguards Order*, FCC 97-352 at ¶ 95, *supra* note 51.

[650] 47 CFR § 64.702(d)(3).

[651] The *Computer III* framework involving nonstructural safeguards, and not this rule, governs when CPE and enhanced services are provided by carriers on an integrated basis.

[652] *Notice* at 12515-16, ¶ 3.

[653] Comments received in the *CMRS Safeguards* proceeding will be referenced as "Safeguards Comments" or "Safeguards Reply." AT&T Wireless Safeguard Comments at 23; AirTouch Safeguards Comments at 3-4; CMT Safeguards Comments at 12; Comcast Safeguards Comments at 14-16; Cox Safeguards Comments at 9; Radiofone Safeguards Comments at 10. Comcast and Cox further argue that without strong CPNI rules in place the Congressional intent behind section 601(d) would be shattered because the incumbent LECs would not be operating on par with their competitors. Comcast Safeguards Comments at 16; Cox Safeguards Comments at 9.

[654] *See e.g.*, AirTouch Comments at 12; ACTA Comments at 6; Arch Comments at 13; ATSI *ex parte* (filed Oct. 29, 1996) at 3; CBT Comments at 9-10; CPI Reply at 13; Excel Comments at 6; Frontier Comments at 8, n.15; ITAA Comments at 9; LDDS Worldcom Reply at 10-11; MCI Comments at 18; Sprint Reply at 11-12; TCG Comments at 4.

implementing regulations now govern a carrier's use of CPNI in the context of all telecommunications services, including cellular and other CMRS offerings.[655]

### 2. Discussion

188. We conclude that we should eliminate both rules 22.903(f) and 64.702(d)(3).[656] We described *supra* that BOCs do not have additional obligations under sections 272 and 274 of the Act when they share local service CPNI with their statutory affiliates. For these reasons, we likewise believe that the new scheme implemented in this order comprehensively replaces these additional obligations. This new paradigm appropriately and sufficiently protects customers' privacy interests as well as competitors' concerns when carriers, including BOCs, share CPNI with their CMRS, information services and CPE affiliates.[657] Specifically, carriers are prohibited from using or disclosing CPNI derived from either their local or long distance service to target customers that they wish to market CMRS offerings, unless the customer approves, or unless the customer is also an existing CMRS customer.[658] This new scheme protects against anticompetitive use of CPNI.[659] Replacing 22.903(f) with the new scheme also more appropriately extends the anticompetitive mechanisms of section 222 to all LECs, not just BOCs, and in connection with all CMRS, not just cellular service.[660] Carriers are also not permitted to use CPNI in connection with CPE and most information services absent customer approval.[661] In contrast, retaining rule 22.903(f) would likely result either in BOCs electing not to share CPNI with their CMRS affiliate, to avoid the requirement that they give the information to competitors, or in disclosure on terms that may undermine customers' privacy and customer convenience goals. These likewise would be the same options faced by carriers when they sought to share CPNI with their CPE or information

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[655] Bell Atlantic/NYNEX Safeguards Comments at 17-18; Bell Atlantic/NYNEX Safeguards Reply at 23; BellSouth Safeguards Comments at 40, 53; CBT Safeguards Comments at 8; GTE Safeguards Comments at 15, 29; GTE Safeguards Reply at 15; PacTel Further Reply at 18-19; SBC Safeguards Comments at 13.

[656] Ameritech Safeguards Reply at 8; PacTel Safeguards Reply at 7-9; *see also* AirTouch Further Comments at 5 (rule 22.903(f) may need to be changed because it contemplated disclosure of CPNI without customer approval).

[657] *See generally supra* ¶ ¶ 160-167, 168, 169.

[658] *Supra* ¶ 53.

[659] *Supra* ¶ 59.

[660] We thus agree in this regard with those commenters urging that the competitive safeguard be so extended. *See, e.g.*, AirTouch Safeguards Comments at 6-8; AT&T Wireless Safeguards Comments at 23; Comcast Safeguards Comments at 14.

[661] *Supra* Part IV.C.

service affiliates should we retain rule 64.702(d)(3). Neither result would further the policies of section 222.

189. We also reject parties' alternative argument, raised in connection with rule 22.903(f), that we exercise our general authority to require that LECs only disclose CPNI to their CMRS providers upon the customer's written approval that has been gathered by the affiliate, not the LEC.[662] At this time, the record does not support the view that additional requirements would be necessary. Such a written approval requirement imposes an additional burden on carriers and inconveniences the customer. Moreover, as discussed below, we are persuaded that the safeguards we announce in this order protect carriers' competitive concerns, as well as customers' interests, such that modification of our rule would be both unnecessary and unwise.[663]

## D. Safeguards Under Section 222

### 1. Background

190. To ensure compliance with our *Computer III* framework, we have considered a variety of safeguards, consisting both of "access" and "use" restrictions.[664] As a general matter, access restrictions prohibit carrier personnel from physically accessing customer records, and include personnel restrictions, such as separate marketing sales forces authorized to access CPNI, as well as network password/I.D. restrictions.[665] With use restrictions, in contrast, employees are able to access customer records, but they are given clear guidelines as to when CPNI use is, and is not, permitted. Use restrictions rely on employee training and software "flags" which indicate, for example, whether customer approval to use CPNI for marketing purposes has been secured.

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[662] AirTouch *ex parte* (filed April 17, 1997) at 2; Radiofone Safeguards Reply at 11-13.

[663] We accordingly also reject commenters' particular suggestions regarding the type of notification BOCs would have to give when sharing CPNI with their cellular affiliate. For example, several carriers suggest that customers be afforded the opportunity to authorize the sharing of CPNI with unaffiliated entities when solicited by the BOCs. AirTouch Safeguards Comments at 7; CMT Safeguards Reply at 12. These carriers and others further suggest that we require that customers must provide their approval in advance and not be given the option to approve making CPNI available only to BOC affiliates. Comcast Safeguards Comments at 15-16; Comcast Safeguards Reply Comments at 17-18; Cox Safeguards Comments at 9; Radiofone Safeguards Comments at 10; Radiofone Safeguards Reply at 11-13. Rather, the notification rules announced herein govern.

[664] *See generally Filing and Review of Open Network Architecture Plans*, 8 FCC Rcd 2606, 2610-11, ¶ ¶ 18-26 (1993); *BOC ONA Order*, 4 FCC Rcd at 222-24, ¶ ¶ 426-430 (describing password/ID access systems and alternative "flagging" systems).

[665] Other options for access restrictions can include rotating passwords, encryption of CPNI, and computer firewalls between databases. *See* CPSR Comments at 13

191. The Commission tentatively concluded in the *Notice* that "all telecommunications carriers must establish effective safeguards to protect against unauthorized access to CPNI by their employees or agents, or by unaffiliated third parties."[666] The Commission sought specific comment on whether the *Computer III* safeguards should continue to apply to the BOCs, AT&T, and GTE,[667] whether they should be extended to other carriers, as well as what other safeguards may be necessary.[668] The Commission also required that "AT&T, the BOCs and GTE must maintain any previously approved mechanisms (*i.e.*, computer password systems, filing mechanisms) to restrict unauthorized internal access to CPNI."[669] The Commission proposed waiting to specify safeguards for telecommunications carriers not currently subject to the *Computer III* requirements, but encouraged these carriers to consider applying the *Computer III* restrictions to fulfill their obligation to develop effective safeguards.[670] The Commission further noted, however, that should the record indicate a need for safeguards applicable to all carriers, the Commission would adopt them.[671]

192. All of the commenters generally agree with our conclusion that carriers must establish safeguards pursuant to section 222 to protect against unapproved use of CPNI.[672] Several carriers assert that they should be permitted to select the means or safeguards they deem appropriate.[673] Others propose that we adopt specific safeguards.[674] In addition, several of the commenters argue that our safeguards should distinguish among carriers and that we

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[666] *Notice* at 12528, ¶ 35.

[667] *Id.* at 12528, ¶ 35.

[668] *Id.* at 12528-29, ¶ 36.

[669] *Id.* at 12529-30, ¶ 39.

[670] *Id.*

[671] *Id.* at 12530, ¶ 41.

[672] *See, e.g.*, ACTA Comments at 4, 6; Bell Atlantic Comments at 2; CPSR Comments at 13; NTIA Comments at 17; NTIA Further Comments at 16-17; U S WEST Comments at 21.

[673] *See, e.g.*, Arch Comments at 13; AT&T Reply at 13 n.32; U S WEST Reply at iv.

[674] For example, AirTouch proposes that we apply our "slamming" rules as a model. *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997) at 10681-82, ¶ 10. *See* discussion *supra* Part V.G.

should continue to apply the *Computer III* safeguards to the BOCs, AT&T, and GTE alone.[675] In contrast, other commenters claim we should eliminate all vestiges of *Computer III*, including its safeguards, in light of the enactment of section 222.[676]

### 2. Discussion

193. We confirm our tentative conclusion that the *Computer III* safeguards, as they currently operate, should not be applied to other carriers. Insofar as the statutory scheme we implement in this order fully supplants our *Computer III* CPNI framework, we are further persuaded that we should likewise not retain the CPNI safeguards designed to ensure compliance within the *Computer III* framework. The record nevertheless supports the need to specify safeguards to prevent unapproved use, disclosure, and access to customer CPNI by carrier personnel and unaffiliated entities under the new scheme. We agree with commenters expressing concern regarding carrier incentives to use CPNI for marketing purposes as well as the potential for anticompetitive behavior.[677] In light of these concerns, we reject suggestions that we generally limit our CPNI requirement to, or impose different CPNI requirements on, large or incumbent carriers. Although local exchange and other incumbent carriers may have more potential for anticompetitive use of CPNI because of their large customer base, we believe competitive concerns raised in the record are addressed generally more effectively by applying our new CPNI scheme to all carriers. As several parties observe,[678] privacy is a concern which applies regardless of carrier size or market share. Indeed, Congress intended for all carriers to safeguard customer information.[679] Therefore, we reject proposals that we generally should limit our new CPNI rules to, or impose different CPNI requirements on, large or incumbent carriers.

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[675] ATSI *ex parte* (filed Oct. 29, 1996) at 3; CBT Comments at 9-10; CPI Reply at 13; Excel Comments at 6; *see also, e.g.*, LDDS Worldcom Comments at 11-12 (believing that the *Computer III* requirements should not apply to nondominant carriers, including AT&T); Sprint Comments at 7 (*Computer III* requirements should apply to the BOCs and GTE).

[676] Ad Hoc Reply at 9; Ameritech Comments at 14; Bell Atlantic Reply at 8; BellSouth *ex parte* (filed Oct. 17, 1996); BOC Coalition *ex parte* (filed Aug. 13, 1997); GTE Reply at 5; NYNEX Comments at 18, 20-21; PacTel Reply at 3-4; SBC Reply at 5; USTA Reply at 3; U S WEST Comments at 21.

[677] *See, e.g.*, AICC Comments at 8; Sprint Reply at 11-12.

[678] *See, e.g.*, Bell Atlantic Reply at 8; GTE Comments at 17; GTE Reply at 5; NYNEX Comments at 20; SBC Comments at 3; SBC Reply at 3; U S WEST Comments at 21.

[679] Section 222(a) provides: "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information . . ." (emphasis added). *See also* Ameritech Comments at 13; Bell Atlantic Comments at 9-10.

194. We recognize, however, that our new CPNI scheme will impose some additional burdens on carriers, particularly carriers not previously subject to our *Computer III* CPNI requirements. We believe, however, that these requirements are not unduly burdensome. All carriers must expend some resources to protect certain information of their customers. Indeed, section 222(a) specifically imposes a protection duty; "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carries, equipment manufacturers, and customers."[680] In addition, for carriers that offer only one service, such as local exchange, the CPNI requirements are minimal, and thus, not overly burdensome.[681] Moreover, although we believe different rules are not generally necessary for small or rural carriers, we note that such carriers may seek a waiver of our new CPNI rules if they can show that our rules would be unduly burdensome, and propose alternative methods for safeguarding the privacy of their customers, consistent with section 222.

195. *Access Restrictions.* We decline to require restrictions that would prohibit carrier personnel from accessing CPNI of customers who have either failed, or expressly declined, to give requisite approval for carrier use of CPNI for marketing purposes. Although access restrictions offer considerable protection against carrier CPNI misuse, we nevertheless agree with those parties that contend that such restrictions are inconsistent with the statutory language and impractical and unnecessary under the statutory scheme.[682] We conclude that general access restrictions are not compatible with the exception set forth in section 222(d)(3), which expressly permits carriers to use CPNI for marketing purposes when customers so approve during inbound calls. Access restrictions preclude any dynamic override capability that would permit marketing employees to access records upon receiving customer approval. According to various commenters, in a password/I.D. system, personnel either have access to the entire customer service record or do not have access.[683] Our existing password/I.D. restriction, applied to the new statutory scheme would mean that carrier representatives would not be able to market additional services to a customer during an inbound call. Rather, the customer who had initiated the call would have to be transferred to another carrier representative with password clearance to access the customer's records for marketing

[680] 47 U.S.C. § 222(a).

[681] *See* discussion *supra* Part IV (carriers only need to notify and obtain approval when they seek to use CPNI outside the customer's total service offering).

[682] Ameritech *ex parte* (filed Oct. 6, 1997); AT&T *ex parte* (filed Aug. 19, 1997); Bell Atlantic/NYNEX *ex parte* (filed Sept. 22, 1997); BOC Coalition *ex parte* (filed Aug. 13, 1997); but see MCI *ex parte* (filed Aug. 15, 1997) (access restrictions appropriate in some retail marketing circumstances).

[683] *See, e.g.*, BOC Coalition *ex parte* (filed Aug. 13, 1997); Sprint *ex parte* (filed Aug. 1, 1997).

purposes.[684] This system inconveniences the customer as well as burdens the carrier-customer dialogue, in conflict with the language and purpose of section 222(d)(3).[685]

196. Conversely, we do not believe that the language in section 222(c)(1) requires that we adopt access restrictions. Although section 222(c)(1)(A) prohibits carriers from "[permitting] *access* to individually identifiable [CPNI]," we interpret this language to obligate carriers to establish sufficient protections against external parties gaining access to customer databases. We agree with Ameritech that the limitations on the access of CPNI apply solely to entities outside of the carrier's organization, whereas the use and disclosure restrictions apply to the carrier.[686] Because customer information is competitively valuable, marketplace forces will ensure that carriers, as a part of normal operating procedures, will protect against unaffiliated entities acquiring access to their customer information. Thus, although we require carriers to establish procedures to protect against unauthorized access to CPNI from unrelated entities, we decline at this time to establish specific restrictions.

197. Moreover, a mechanical access system is expensive to establish and to maintain.[687] Because we find that section 222 applies to all telecommunications carriers, and in contexts beyond CPE and enhanced services markets, any access restriction requirement under section 222 would represent a considerable expansion of the existing *Computer III* regulatory framework. We are not persuaded that the increased protection afforded through access restrictions or separate marketing personnel would justify the additional expense of such a system, which would be borne by all carriers, including those medium and small sized carriers that have never before been subject to CPNI regulation. Such a requirement may produce inefficiencies particularly for small carriers, and may thereby dampen competition by increasing the costs of entry into telecommunications markets. We conclude that use restrictions, as described below, can and will be effective when coupled with personnel

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[684] MCI *ex parte* (filed Aug. 15, 1997).

[685] In the *Further Notice of Proposed Rulemaking*, *infra* Part IX.B, we seek comment on whether access restrictions are required to protect carrier and customer interests in the wholesale and resale context, pursuant to obligations established under sections 222(a) and (b). In this regard, several carriers have indicated that access restrictions may be appropriate and consistent with the statute in this limited respect. Ameritech *ex parte* (filed Oct. 6, 1997). Accordingly, we note that our decision not to impose access restrictions at this time in the retail context does not, in our judgment, foreclose the possibility of subsequent access requirements in the wholesale or resale circumstance, based on the record developed through the *Further Notice*.

[686] Ameritech Comments at 13.

[687] For example, the BOCs argue, based upon U S WEST estimates, that a computerized access system could cost as much as $100 million and take approximately five years to implement. BOC Coalition *ex parte* (filed Aug. 13, 1997). Use restrictions, in contrast, they claim would cost approximately $700,000 and take about 9-18 months to implement. *Id.*

training. In addition, they promote customer convenience and permit carriers to operate more efficiently with less regulatory interference.[688]

198. *Use Restrictions and Personnel Training.* We specifically require that carriers develop and implement software systems that "flag" customer service records in connection with CPNI. Carriers have indicated that their systems could be modified relatively easily to accommodate such CPNI "flags."[689] The flag must be conspicuously displayed within a box or comment field within the first few lines of the first computer screen. The flag must indicate whether the customer has approved the marketing use of his or her CPNI, and reference the existing service subscription. In conjunction with such software systems, we require that all employees with access to customer records be trained as to when they can and cannot access the customer's CPNI.[690] Carriers must also maintain internal procedures to handle employees that misuse CPNI contrary to the carriers' stated policy. These requirements represent minimum guidelines that we believe most carriers can readily implement and that are not overly burdensome.[691]

199. *Access Documentation.* To encourage carrier compliance with our CPNI restrictions and to ensure a method of verification in the event of a subsequent dispute, we require that carriers maintain an electronic audit mechanism that tracks access to customer accounts. The system must be capable of recording whenever customer records are opened, by whom, and for what purpose. We believe awareness of this "audit trail" will discourage unauthorized, "casual" perusal of customer accounts, as well as afford a means of documentation that would either support or refute claimed deliberate carrier CPNI violations. Such access documentation will not be overly burdensome because many carriers maintain such capabilities to track employee use of company resources for a variety of business purposes unrelated to CPNI compliance, such as to document the volume of computer and

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[688] On this basis, we further reject MCI's suggested access restrictions that carriers have separate groups of marketing personnel who either are authorized to access CPNI or who are not. MCI *ex parte* (filed Aug. 15, 1997). Should a record of CPNI misuse develop, however, we can and will revisit our conclusions. *Infra* ¶ 202.

[689] *See, e.g.*, AT&T *ex parte* (filed Aug. 19, 1997); Bell Atlantic/ NYNEX *ex parte* (filed Sept. 22, 1997); Sprint *ex parte* (Aug. 1, 1997).

[690] AirTouch Comments at 12 (employee training about CPNI prohibitions and public descriptions of safeguards systems are essential to ensure proper use of CPNI).

[691] Employee training is presently undertaken by most carriers, as a matter of business practice, to assure the privacy of customer information. *See, e.g.*, Bell Atlantic/ NYNEX *ex parte* (filed Sept. 22, 1997); BOC Coalition *ex parte* (filed Aug. 13, 1997).

database use, as well as for personnel disciplinary matters.[692] We further require that carriers maintain such contact histories for a period of at least one year to ensure a sufficient evidentiary record for CPNI compliance and verification purposes.

200. *Supervisory Review for Outbound Marketing Campaigns.* In addition to the electronic use restrictions, personnel training, and access documentation, we require carriers to establish a supervisory review process that ensures compliance with CPNI restrictions when conducting outbound marketing. Although supervisory review would neither be convenient nor practical when customers initiate a service call (*i.e.*, in the inbound marketing context), we believe that such review is fully warranted in connection with outbound marketing campaigns. There is both less likelihood that customers will detect CPNI violations and greater incentive for sales employees to misuse CPNI when the dialogue with the customer is initiated by the carrier. Indeed, a major focus of outbound sales representatives is on the acquisition of new customers rather than on the retention of, and service to, current customers. Accordingly, we require that sales personnel obtain supervisory review of any proposed request to use CPNI for outbound marketing purposes. Requiring prior supervisory review of marketing plans will safeguard against over-zealous sales representatives, as well as afford a subsequent means of verifying CPNI compliance. Moreover, insofar as marketing plans are presently developed, reviewed and maintained as a matter of sound business practice, our requirement should not be burdensome to carriers. As MCI explains, "event histories" (like contact histories) are routinely evaluated by carriers to determine the success of marketing campaigns.[693] We require carriers to maintain a record of these event histories for at least one year from the date of the marketing campaign.

201. *Corporate Certification.* Finally, we agree with AirTouch that corporate certification is an appropriate and effective additional safeguard.[694] Accordingly, we require each carrier to submit a certification signed by a current corporate officer, as an agent of the corporation, attesting that he or she has personal knowledge that the carrier is in compliance with our CPNI requirements on an annual basis. This certification must be made publicly available, and be accompanied by a statement explaining how the carrier is implementing our CPNI rules and safeguards.[695]

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[692] *See e.g.*, AirTouch *ex parte* (filed Oct. 29, 1997); AT&T *ex parte* (filed Aug. 19, 1997); Bell Atlantic/NYNEX *ex parte* (filed Sept. 22, 1997). *See also* U S WEST *ex parte* (filed Nov. 14, 1997) at 10-11 ("U S WEST currently has the capability to assess if an individual accesses a system inappropriately, when such access was accomplished, and -- in most circumstances -- what information was retrieved.").

[693] MCI *ex parte* (filed Aug. 15, 1997) (makes distinction among safeguards applicable to outbound and inbound marketing).

[694] AirTouch Comments at 12.

[695] We similarly require commercial broadcasters to keep publicly available inspection files on site. *See* 47 C.F.R. § 73.3526.

202. *Additional requirements.* The Commission will enforce all rules announced in this order upon their effective date. Because carriers may need time to conform their data systems and operations to comply with the software flags and electronic audit mechanisms required under this order, however, we will not seek enforcement of these specific safeguard rules for a period of eight months from the date these rules become effective.[696] After that time, we authorize the Chief of the Common Carrier Bureau to undertake enforcement actions when necessary and appropriate, and, to the extent that carrier behavior justifies requirements beyond those outlined herein, to establish additional safeguards. This delegation to the Common Carrier Bureau will facilitate the handling of CPNI compliance issues in an expedited manner.

## IX. FURTHER NOTICE OF PROPOSED RULEMAKING

203. *Implementation of Sections 222(a) and (b).* The Commission in the *Notice* focused on issues relating to the implementation of sections 222(c)-(f).[697] Based on various responses from parties, we now seek further comment on three general issues that principally involve carrier duties and obligations established under sections 222(a) and (b) of the Act. Specifically, section 222(a) requires telecommunications carriers "to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier."[698] Section 222(b) provides that "a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[699]

### A. Customer Right to Restrict Carrier Use of CPNI for Marketing Purposes

204. Section 222(c)(1) prohibits carriers from using, disclosing, or permitting access to CPNI without customer approval for purposes other than those expressly provided in sections 222(c)(1)(A) and (B), and those in connection with the exceptions established in sections 222(d)(1)-(3).[700] Section 222, however, is silent on whether a customer has the right to restrict a telecommunications carrier from using, disclosing, or permitting access to CPNI

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[696] BOC Coalition *ex parte* (filed Aug. 13, 1997).

[697] *Notice* at 12514, ¶ 2 n.7.

[698] 47 U.S.C. § 222(a).

[699] 47 U.S.C. § 222(b).

[700] 47 U.S.C. § 222(c)(1).

within the circumstances defined by subsections 222(c)(1)(A) and (B). While the *Notice* referred to customers' "rights to restrict access to their CPNI," it did so in the context of when carriers must seek approval for CPNI use for purposes outside the scope of the exceptions in sections 222(c)(1)(A) and (B).[701]

205. One view is that customers should be able to restrict carrier use of CPNI for all marketing purposes, even within the customer's total service offering. This position may be supported by the privacy protection in section 222(a), which imposes on every telecommunications carrier "a duty to protect the confidentiality of proprietary information of, and relating to . . . customers . . . ,"[702] as well as by the principle of customer control implicitly embodied in section 222(c).[703] In addition, interpreting section 222 to permit customers to restrict all marketing use of CPNI could be viewed as furthering the privacy-competition balance struck in section 222, insofar as such a right would allow customers to prevent carrier marketing practices that they found objectionable as their service relationship with the carrier grew. Under this view, the only limitations on the customer's right to restrict uses of CPNI within sections 222(c)(1)(A) and (B) arguably would be those "required by law" in accordance with section 222(c)(1), as well as those set forth in section 222(d).[704] We seek comment on this issue of whether customers have a right to restrict all marketing uses of CPNI. Parties supporting a particular interpretation should state the statutory as well as policy basis for their conclusion and should demonstrate why other conclusions are not justified.

### B. Protections for Carrier Information and Enforcement Mechanisms

206. We seek comment on what, if any, safeguards are needed to protect the confidentiality of carrier information, including that of resellers and information service providers, that are in addition to those adopted in this accompanying order. We note that Congress expressly protected carrier information in section 222(a), as well as in the specific limitations on the use of that information in section 222(b).[705] We believe that Congress' goals of promoting competition and preserving customer privacy will be furthered by protecting the competitively-sensitive information of other carriers, including resellers and information service providers, from network providers that gain access to such information

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[701] *Notice* at 12526-27, ¶ 28.

[702] 47 U.S.C. § 222(a).

[703] 47 U.S.C. § 222(c).

[704] The preface in section 222(d) establishes that "[n]othing in [section 222] prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents" in the three specified circumstances. 47 U.S.C. § 222(d).

[705] 47 U.S.C. § 222(a), (b).

through their provision of wholesale services. Therefore, we seek comment on what, if any, additional regulations or safeguards are necessary to further this goal. These safeguards, for example, may include personnel and mechanical access restrictions.[706] Parties identifying specific safeguards should comment explicitly on the costs and benefits of imposing such regulation.

207. We also seek comment on what, if any, further enforcement mechanisms we should adopt to ensure carrier compliance with our rules, or that may be necessary to encourage appropriate carrier discharge of their duty under section 222(a) to protect the confidentiality of customer information. We note, for example, that the Commission in other proceedings has sought to compensate carriers who have become victims of anticompetitive behavior,[707] as well as to streamline and update the formal complaint process in order to promote the policies of the 1996 Act.[708] Parties identifying specific enforcement mechanisms should comment explicitly on the costs and benefits of imposing such regulation.

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[706] TRA has proposed five specific safeguards to protect the confidentiality of competitively-sensitive data of resellers. TRA Comments at 3-12. Certain commenters have indicated that safeguards beyond access restrictions may be appropriate and technically feasible in the context of their wholesale services operations. In fact, these carriers have indicated that such safeguards either are already in place or forthcoming shortly. *See, e.g.*, U S WEST *ex parte* (filed Nov. 14, 1997) at 10-11 & n.33; Ameritech *ex parte* (filed Oct. 6, 1997).

[707] Section 258 of the Act addresses remedies for illegal changes in subscriber carrier selection providing that "[a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation." 47 U.S.C. § 258; *cf. In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, 12 FCC Rcd 10674, Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration (1997) (*Slamming FNPRM*).

[708] *Cf. Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings*, CC Docket No. 96-238, Public Notice, DA 97-2178 (rel. Dec. 12, 1997) (*Accelerated Docket Public Notice*); *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, FCC 97-396 (rel. Nov. 25, 1997). In the *Accelerated Docket Public Notice*, the Commission sought comment on whether the needs of industry participants for an expedited complaint process could be met better by a hearing-type, accelerated complaint process administered by the Common Carrier's Enforcement Division.

### C. Foreign Storage of, and Access to, Domestic CPNI

208. The Federal Bureau of Investigation (FBI) asks the Commission to regulate the foreign storage of, and foreign-based access to, CPNI of U.S. customers who subscribe to domestic telecommunications services (domestic CPNI).[709] The FBI contends that vital law enforcement, public safety, national security, business, and personal privacy reasons justify a prohibition under section 222 on carriers storing domestic CPNI in foreign countries, for any purpose, including billing and collection.[710] The FBI further maintains that permitting direct foreign access or foreign-storage of CPNI would seriously undermine important U.S. governmental, business, and privacy-based protections afforded to CPNI under other international and bilateral treaties.[711] According to the FBI, the Commission has the authority to prohibit such foreign storage or access based upon our jurisdiction conferred in section 222.[712] We seek comment on the FBI's proposal. In particular, we seek comment on whether the duty in section 222(a) upon all telecommunications carriers to protect the confidentiality of customers' CPNI, or any other provision, permits and/or requires us to prohibit the foreign storage or access to domestic CPNI.

209. As an exception to this administrative prohibition, the FBI suggests that foreign storage or access to domestic CPNI may be permitted upon informed written customer approval.[713] When a U.S. domestic customer consents to having his or her CPNI stored or accessed from a foreign country, the FBI further proposes, however, that we require carriers to keep a copy of that customer's CPNI record within the U.S. for public safety, law enforcement, and national security reasons, so that such information is available promptly to law enforcement.[714] We seek comment on whether requiring written customer consent to store or access CPNI from a foreign country and maintaining duplicate CPNI records in the

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[709] FBI *ex parte* (filed Jul. 9, 1997) at 1. Domestic CPNI is CPNI derived from telecommunications services rendered solely within the United States. Domestic CPNI is therefore different from the "foreign derived U.S. customer CPNI" identified in the *Foreign Participation Order*, FCC 97-398, at ¶ 175 n. 351, *supra* note 604.

[710] For example, the FBI notes that the foreign storage or direct foreign access to the CPNI of intelligence officers or U.S. government employees could compromise national security and on-going investigations, and be perhaps life-threatening to those individuals. Furthermore, the FBI notes that the CPNI of U.S. governmental officials and the personal nature of such information could be used as "blackmail" or as leverage to recruit such officials. FBI *ex parte* (filed Jul. 9, 1997) at 8 n.17 & n.18.

[711] *Id.* at 2.

[712] *Id.*

[713] *Id.* at 9.

[714] *Id.* at 10 n.20.

U.S are necessary to protect customer confidentiality under section 222(a) or any other provision.

210. Finally, the FBI also requests that we require carriers to maintain copies of the CPNI of all U.S.-based customers, regardless of whether they are U.S. domestic customers, because of the need for prompt, secure, and confidential law enforcement, public safety, or national security access to such information, pursuant to lawful authority.[715] The FBI cites the need of such information for investigations and as trial evidence.[716] We seek comment on this proposal.

## X. PROCEDURAL ISSUES

### A. Second Report and Order

#### 1. Final Regulatory Flexibility Analysis

211. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice*.[717] The Commission sought written public comment on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Second Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[718]

##### a. Need for and Objectives of the Proposed Rules

212. The Commission, in compliance with section 222 of the 1996 Act, promulgates rules in this order to reflect Congress' directive to balance the competitive and customer privacy interests associated with the use and protection of customer proprietary network information (CPNI), while fully considering the impact of these requirements on small carriers. This order reflects the statutory principle that customers must have the opportunity to protect the information they view as sensitive and personal from use and disclosure by

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[715] *Id.* at 5 n.8. The FBI distinguishes among "Domestic Customers" and U.S.-based customers. *Id.* at 1 n.1. The latter includes those customers that make calls pursuant to special contract, tariff arrangements, international services or similar volume discount arrangements. Domestic customers, in contrast, are those whose customers whose telecommunications service is "essentially intra-U.S. in nature." *Id.*

[716] *See, e.g., id.* at 7.

[717] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*Notice*).

[718] 5 U.S.C. § 604.

carriers. As a general matter, we find that customer approval for carriers to use, disclose, or permit access to CPNI is inferred from the existing customer-carrier relationship; therefore, we conclude that such consent should be limited to the "total service offering" to which the customer subscribes from a carrier. To preserve the customer's control over the dissemination of sensitive information, we require an express approval requirement for the use of CPNI beyond the total service offering to which the customer subscribes from a carrier. While these rules permit customers to decide whether and to what extent their CPNI is used, they also restrict carriers' anticompetitive use of CPNI.

### b. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

213. In the IRFA, the Commission generally stated that any rule changes that might occur as a result of this proceeding could impact small business entities. Specifically, in the IRFA, the Commission indicated there were no reporting, recordkeeping, or other compliance requirements. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. In response we received no comments specifically directed to the IRFA. As noted *infra* Part X.A.1.e of this FRFA, in making the determinations reflected in this order, we have given consideration to those comments of the parties that addressed the impact of our proposed rules on small entities.

### c. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

214. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by our rules.[719] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[720] For the purposes of this order, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[721] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the

[719] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[720] 5 U.S.C. § 601(6).

[721] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

Small Business Administration (SBA).[722] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[723] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

215. Although affected incumbent local exchange carriers (ILECs) may have no more than 1,500 employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they either are dominant in their field of operations or are not independently owned and operated, and are therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by SBA as "small business concerns."[724]

216. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[725] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned and operated."[726] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this order.

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[722] 15 U.S.C. § 632.

[723] 13 C.F.R. § 121.201.

[724] 13 C.F.R. § 121.210 (SIC 4813).

[725] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[726] 15 U.S.C. § 632(a)(1).

217. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[727] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[728] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small entity telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by this order.

218. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[729] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[730] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 small providers of local exchange service are small entities or small ILECs that may be affected by this order.

219. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most

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[727] *1992 Census, supra* note 725.

[728] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[729] Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (*Number of Carriers Paying into the TRS Fund by Type of Carrier*) (Nov. 1997).

[730] *Id.*

reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.[731] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by this order.

220. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[732] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by this order.

221. *Operator Service Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.[733] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by this order.

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[731] *Id.*

[732] *Id.*

[733] *Id.*

222. *Pay Telephone Operators.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of pay telephone operators nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 441 companies reported that they were engaged in the provision of pay telephone services.[734] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 441 small entity pay telephone operators that may be affected by this order.

223. *Wireless Carriers.* The SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[735] According to the SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[736] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by this order.

224. *Cellular Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 804 companies reported that they were engaged in the provision of

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[734] *Id.*

[735] *1992 Census, supra* note 725.

[736] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

cellular services.[737] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by this order.

225. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.[738] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by this order.

226. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined small entity in the auctions for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[739] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than $15 million for the preceding three calendar years.[740] These regulations defining small entity in the context of broadband PCS auctions have been approved by the SBA. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS

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[737] *Id.* This category includes PCS carriers.

[738] *Id.*

[739] *Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap.* Report and Order, 11 FCC Rcd 7824 (1996).

[740] *Id.*